

The Interlaken Declaration- the Beginning of a New Era for the European Court of Human Rights?

Alastair Mowbray: Professor of Public Law, University of Nottingham

© A.R. Mowbray

This is a pre-copy-editing, author-produced PDF of an article accepted for publication in Human Rights Law Review. 10(3), 519-528 (2010) following peer review. The definitive publisher-authenticated version is available online at: <http://hrlr.oxfordjournals.org/cgi/reprint/ngq017?ijkey=qk6zK3zRBIsxUMK&keytype=ref>].

As we noted in a previous issue of the *Review*¹, the President of the European Court of Human Rights (hereafter the Court), Jean-Paul Costa had publicly called upon the State Parties to the European Convention on Human Rights (hereafter the ECHR or the Convention) to hold a conference of high level representatives to both re-emphasise State support for the Court and to initiate a process of long-term reform of the Strasbourg control system. Switzerland which was to assume the rotating chair of the Committee of Ministers, of the Council of Europe, undertook to organise such a conference, to be held in Interlaken, during its period of office in early 2010.

President Costa published a memorandum in the summer of 2009 setting out his hopes for the conference.² After expressing his belief that the Convention and Court had achieved “remarkable success” in protecting human rights in the member States he observed that Court’s case load was too heavy.³ 100,000 cases were pending before the Court and this resulted in the length of proceedings before the Court being excessive in some instances. Three categories of cases could be identified. First the large number of inadmissible applications. Second repetitive applications based upon structural defects in particular States previously identified by the Court. Third rarer applications raising novel issues. The Court had sought to enhance its efficiency in determining applications by, for example, developing the pilot judgment procedure.⁴ Funding of the Court from the member States of the Council of Europe had increased significantly. But, the Court did not have sufficient administrative autonomy within the Council of Europe or control over its internal judicial arrangements (e.g. the size of its Chambers).

The President then identified three aims for the Interlaken Conference. At the political level the Parties needed to endorse the “sharing of responsibilities between the

¹ A. Mowbray, “Crisis Measures of Institutional Reform for the European Court of Human Rights” (2009) 9 *Human Rights Law Review* 64.

² Memorandum of the President of the European Court of Human Rights to the States With a View to preparing the Interlaken Conference, 3 July 2009: all the Council of Europe documentation referred to in this commentary is available from www.coe.int

³ Ibid. at p. 1.

⁴ See, D.J. Harris et al, *Law of the ECHR* 2nd ed, (Oxford: OUP, 2009) at p. 851.

States and the Court.”⁵ Secondly, the Conference should begin the process of determining the long-term reforms necessary for the Court’s sixtieth anniversary in 2019. Whilst the right of individual complaint to the Court ought to be preserved, how should such applications be regulated and determined? A new filtering mechanism under the control of the Court might need to be created. The large numbers of repetitive applications disclosed that the principle of subsidiarity (i.e. State Parties have the primary responsibility for guaranteeing the rights and freedoms enshrined in the Convention) was not working properly. A preliminary reference mechanism, inspired by the experience of the European Court of Justice, could be contemplated. Thirdly, during the shorter-term, States must expand their domestic translation of Court judgments and enhance their training of relevant personnel in Convention obligations. Whilst in the medium-term a Statute of the Court could facilitate both the enhancement of the Court’s autonomy and its internal adaptation to new working methods. The ultimate aim of the Conference should be to “lay down a clear roadmap for both the immediate and the more distant future.”⁶

The Steering Committee for Human Rights (CDDH), composed of experts appointed by the member States of the Council of Europe, was asked by the Committee of Ministers’ Deputies (their diplomatic representatives at Strasbourg) to prepare a paper on the topics to be discussed at the Interlaken Conference. CDDH produced its Opinion at the end of 2009.⁷ The paper began by outlining the scale of the workload crisis facing the Court. An ever increasing number of applications, of which about 90% are “clearly inadmissible”⁸, combined with about 50% of admissible applications raising complaints that are similar to previous cases adjudged by the Court (“repetitive applications”) meant that most Court time was spent on applications which should have been resolved at the national level. Furthermore, the Committee of Ministers role of supervising the execution of Court judgments where breaches of the Convention had been found⁹ was becoming increasingly challenging and the Committee, assisted by just 27 lawyers, currently had 8,600 judgments to supervise. Consequently, in the view of CDDH, “[t]his global situation is untenable and requires urgent action, not only to save the Court but also to reinforce the Convention system as a whole- which would have the result of relieving the burden on the Court and enhancing the effectiveness of the protection of individual rights.”¹⁰

Regarding medium to long-term developments of the ECHR system, CDDH strongly supported the maintenance of the right of individual petition by aggrieved applicants.¹¹ But that had to be combined with, what should be the main goal of the

⁵ Supra n. 2 at p. 3.

⁶ Ibid. at p. 7.

⁷ CM(2009)181: 2 December 2009.

⁸ Ibid. at para. 5.

⁹ Under Article 46 of the ECHR.

¹⁰ Supra n.7 at para. 8.

¹¹ Under Article 34 of the ECHR.

Interlaken Conference, making the “principle of subsidiarity...fully operational”.¹² Long-term effectiveness also required that there should be an equilibrium between the numbers of applications being made to the Court and its ability to determine them. The achievement of this goal would necessitate a reduction in the number of inadmissible applications and repetitive complaints (by effective national protection of Convention rights/freedoms) together with the more effective processing of cases by the Court. CDDH also raised the controversial question as to whether in the long-term the Court ought to have the power to select which applications would receive a judicial determination. However, CDDH did not believe that it was appropriate at present to offer specific proposals regarding this matter.

Proposals for long-term reform which CDDH considered should be subject to further examination included the promotion of national courts collaboration with the Court by the former being able to seek advisory opinions from the latter on the interpretation of the Convention. A study of whether the levels of just satisfaction (*i.e.* financial compensation) awarded by the Court to successful applicants¹³ encouraged applications being lodged with the Court. The possibility of amendments to the procedures of the Court being agreed by the Committee of Ministers (via a Statute of the Court), rather than through the protracted process of States agreeing an amending Protocol to the Convention. Evaluating whether a new filtering mechanism to determine the admissibility of applications, going beyond the new single-judge formation in Protocol 14/Protocol 14 *bis*, ought to be created. The introduction of fees for making an application to the Court, to deter clearly inadmissible applications, might be contemplated. Regarding the appointment of Judges to the Court, CDDH advocated “transparent and rigorous selection procedures at the national and European levels”¹⁴. CDDH proposed that the Court’s Judges should have a knowledge of public international law. Finally, CDDH recommended that the development of the ECHR system following on from the Interlaken Conference should be based upon the effects of the reforms introduced by Protocols 14/14*bis*.

The next Council of Europe institution to publish a memorandum directed at the Interlaken Conference was the Commissioner for Human Rights (Thomas Hammarberg).¹⁵ He believed that the high level of clearly inadmissible applications being lodged with the Court disclosed, “serious deficiencies in the provision of information on the ECHR and the Court’s procedures.”¹⁶ When combined with the large number of repetitive applications and the high success rate of cases reaching a judgment on the merits (in over 81% of judgments since 1959 the original and full-time Courts have found at least one violation¹⁷) these statistics led the Commissioner to conclude that,

¹² Supra n.7 at para. 10.

¹³ Under Article 41 of the ECHR.

¹⁴ Supra n. 7 at para. 30.

¹⁵ CommDH(2009)38: 7 December 2009.

¹⁶ Ibid. at para.4.

¹⁷ Ibid. at para. 2.

"there is a serious gap of systematic implementation by States of their undertakings under the Convention".¹⁸ Therefore, the Commissioner advocated, *inter alia*, that State Parties to the ECHR translate all the leading judgments of the Court into their national languages to facilitate domestic courts comprehension of the Convention's principles. Such translations would also foster national scrutiny of draft legislation and administrative policies for their compatibility with the ECHR. Drawing upon his earlier published recommendation¹⁹, the Commissioner proposed that States ought to develop national human rights action plans. These would aim to "integrate human rights into the ordinary work of the public administration"²⁰ and "foster a human rights culture"²¹ by incorporating their study in education and training. The Commissioner invited the State Parties to commit themselves, at Interlaken, to initiating and implementing these national measures.

The Secretary General of the Council of Europe (Thorbjorn Jagland) produced a paper for the Interlaken Conference in which he expressed the view that the Court was in a "desperate situation".²² As many States had failed to effectively entrench the Convention the consequence was that numerous persons lodged applications with the Court. But, he did not believe that the Court should "be acting as a small claims court for violations of relatively minor consequence for individuals arising from persistent systemic problems."²³ Conversely he cautioned against perceiving the Court as Europe's supreme court:

"In recent years, there has been undefined talk of the Court becoming a "Constitutional Court". Although this has not yet led to any sort of agreement, let alone results, it has not been helpful. The Convention is not intended to be a "European constitution" and it is difficult to see how the Court could become like any existing national constitutional court."²⁴

However, the Secretary General supported strengthening the co-operation between national courts and the Court and, therefore, he favoured enabling the latter to receive requests for advisory opinions/preliminary rulings from the former. To ensure the Court's expertise and experience he advocated considering the establishment of a screening panel, composed of former senior national and international judges, to examine lists of judicial nominees before they were submitted to the Parliamentary Assembly. To deal

¹⁸ Ibid. at para. 5.

¹⁹ *Recommendation on systematic work for implementing human rights at the national level*, CommDH(2009)3: 18 February 2009.

²⁰ Supra n.15 at para. 22.

²¹ Ibid. at para. 23.

²² *Contribution of the Secretary General of the Council of Europe to the Preparation of the Interlaken Ministerial Conference*, SG/Inf(2009)20, 18 December 2009, at para.15.

²³ Ibid. at para. 7.

²⁴ Ibid. at para 28.

with the mass of inadmissible applications lodged with the Court, the Secretary General strongly encouraged the Court to develop, in the short-term, a rotational system amongst the existing Judges to filter applications and in the future he raised the possibility of delegating the determination of some case decisions to Registry officials subject to judicial control.

The Committee on Legal Affairs and Human Rights (of the Council of Europe's Parliamentary Assembly) held a hearing, on 16 December 2009, at which a number of experts presented their views on the issues to be addressed at the Interlaken Conference. Subsequently, the Chairperson of the Committee (Mrs Herta Daubler-Gmelin) produced a summary of the most important points raised during the hearing.²⁵ These included asking whether ministers would be willing to "name and shame" States that were jeopardising the ECHR system by failing to comply with their Convention obligations and supporting agreed reform measures? She also addressed the sensitive topic of the quality of the Strasbourg Judges:

The most eminent jurists in member states with relevant experience should be encouraged to leave flourishing national careers, preferably in their late 40s, 50s and early 60s, to serve in Strasbourg. When national selection procedures are inadequate, the Assembly's hands are tied; often candidates are good, but not outstanding. If the findings of the Strasbourg Court are to be recognised as authoritative by their peers at the domestic level, the Assembly must be in a position to elect top quality judges.²⁶

The Court was unable to provide "justice to all individuals" and the roles of Committees and single-judge formations within the Court constituted a "'fig-leaf" that maintains the legal fiction of a judicial determination of all applications".²⁷ Furthermore:

it is totally absurd for the Court and its staff to waste time and effort in dealing with repetitive applications (surely old democracies, like Italy, not to mention more recent "persistent defaulters" such as Moldova, Poland, Romania, Russia and Ukraine, ought to be subjected to "aggravated", if not "punitive" or "exemplary", damages".²⁸

Was it necessary to create a new judicial filtering body within the Court or could that task be undertaken by a rotating pool drawn from the current Judges? Might the introduction of a small fee for lodging an application with the Court deter hopeless complainants? If States were to reinforce their domestic mechanisms for safeguarding Convention rights, including creating parliamentary bodies to oversee the national implementation of measures to address Court judgments finding breaches of the ECHR,

²⁵ *The future of the Strasbourg Court and enforcement of ECHR standards: reflections on the Interlaken process*, AS/Jur(2010)06, 21 January 2010.

²⁶ Ibid. at para. 5.

²⁷ Ibid. at para. 9.

²⁸ Ibid.

that would make a significant contribution to reducing the flood of applications engulfing the Court.

A group of non-governmental organisations produced a Joint NGO appeal to the Interlaken Conference²⁹. The submission began by noting that the people in Europe have at least as strong an interest in the long-term effectiveness of the Court as the States, therefore civil society should be consulted before the Conference and during the subsequent reform process. The NGOs supported greater help being given to potential applicants regarding the ECHR's admissibility criteria. Wider translation of the Court's jurisprudence would facilitate enhanced domestic understanding and safeguarding of Convention rights. The Judges of the Court must be selected via inclusive and transparent processes. Contributing NGOs opposed measures, such as application fees, new admissibility criteria or empowering the Court to exercise a selective discretion over cases accepted for adjudication, that would undermine the access of individual complainants to the Court. Further deliberation was needed on whether national courts should be authorised to seek advisory opinions from the Court or if a simplified mechanism for amending the procedures of the Court should be created.

The Interlaken Conference on the Future of the European Court of Human Rights (hereafter the Conference) was held on 18-19 February 2010. Shortly before the Conference formally opened the Russian government deposited its instrument of ratification of Protocol 14 (to the ECHR). This long-awaited development was a significant contribution towards enhancing the efficiency of the Court and a positive start to the Conference. The Chairperson of the Committee of Ministers (Micheline Calmy-Rey) welcomed the ratification as "excellent news for all Europeans".³⁰ While the Secretary General stated that this action demonstrated Russia's "commitment to Europe". Furthermore, the ratification was "the result of a dialogue conducted with the highest Russian authorities and signals the start of a genuine reform of the Court."³¹ Protocol 14 will enter into force in June 2010, replacing the more circumscribed interim reforms contained in Protocol 14^{bis}³².

The Conference began at 3pm on the 18 February, but "heads of delegations at ministerial level and high officials of the institutions of the Council of Europe" were given the opportunity to go on a preliminary five and a half hour excursion to Murren to enjoy

²⁹ *Human rights in Europe: decision time on the European Court of Human Rights*, 7 December 2009: text contained in *Preparatory Contributions High Level Conference on the Future of the European Court of Human Rights*, Directorate General of Human Rights and Legal Affairs, (2010); www.coe.int/justice The contributing NGOs were: Amnesty International, the Aire Centre, European Human Rights Advocacy Centre, Human Rights Watch, Interights, the International Commission of Jurists, Justice, Liberty and Redress. I am grateful to Jill Heiler of Amnesty International for drawing my attention to this material.

³⁰ Press Release 139(2010), 18 February 2010.

³¹ Press Release 140(2010), 18 February 2010.

³² Discussed in Mowbray *supra* n.1.

“panoramic views of the Swiss Alps”.³³ After ten minute addresses by leading Council of Europe figures, including the Secretary General, President Costa and the Commissioner for Human Rights, each State’s head of delegation (most of whom were Ministers of Justice) were given three minutes to make their statements. These statements were spread over the afternoon/early evening of the 18th and the morning of the 19th. A representative of NGOs gave a ten minute address on behalf of civil society. The Conference concluded, by lunchtime, with all the delegates adopting the Interlaken Declaration (hereafter the Declaration) and Action Plan³⁴ by acclamation.

The Declaration began by expressing the State Parties “strong commitment” to the Convention and the Court.³⁵ But, the Strasbourg supervisory system was subsidiary to “the fundamental role which national authorities, ie. governments, courts and parliaments, must play in guaranteeing and protecting human rights at the national level.”³⁶ Additional measures were “urgently required” to secure a balance between the numbers of applications being made to the Court and the number of judgments and decisions given by the Court. Furthermore, the Court had to be able to reduce the backlog of pending cases. Therefore, an Action Plan was adopted which provided “political guidance for the process towards long-term effectiveness of the Convention system”.³⁷ Whilst reaffirming the “fundamental importance” of the right of individual petition to the Court, the Action Plan called upon the Committee of Ministers to examine new procedural rules or practices regulating access to the Court.³⁸ State Parties were invited to have regard to Court judgments involving other States where similar problems existed in their legal systems. Also, the possibility of seconding national judges and high-level lawyers to the Registry of the Court should be considered. The Action Plan recommended that the Court, in the short-term, implement a mechanism “within the existing bench” to “ensure effective filtering” of applications.³⁹ Whilst the Committee of Ministers should consider the creation of a filtering mechanism, “within the Court going beyond the single judge procedure”.⁴⁰ Also, the Committee ought to examine whether the judges responsible for filtering could in the future be empowered to determine repetitive cases. The judges of the Court should have “knowledge of public international law” and “the Court’s composition should comprise the necessary practical legal experience”.⁴¹ The Court was encouraged to request (under Article 6 of Protocol 14) the

³³ Conference programme: I am indebted to Dr Ed Bates for drawing my attention to the touristic delights available to senior participants at the conference.

³⁴ 19 February 2010.

³⁵ Ibid. at PP1.

³⁶ Ibid. at PP6.

³⁷ Ibid. (11).

³⁸ Ibid. A.3.

³⁹ Ibid. C.6(c).

⁴⁰ Ibid.

⁴¹ Ibid. E.8.

Committee of Ministers to authorise the reduction, for a fixed period of time, in the size of Chambers to five judges. The supervision of the execution of judgments by the Committee of Ministers should be made more "efficient and transparent" by, *inter alia*, according greater priority to cases disclosing significant structural problems. The Conference also called upon the Committee of Ministers to examine the feasibility of introducing a simplified mechanism, such as a Statute for the Court, for future reforms of procedural elements of the Convention. The State Parties and the Committee of Ministers should consult with civil society on the implementation of the Action Plan. A series of deadlines were elaborated. By the end of 2011 State Parties should inform the Committee of Ministers of their actions taken to implement the Action Plan. The Committee of Ministers, by June 2011, ought to implement those measures not requiring amendment of the ECHR. The Committee should also authorise its competent bodies to produce specific proposals for measures requiring amendment of the ECHR (including a filtering mechanism and a simplified reform process) by June 2012. Between 2012 and 2015 the Committee of Ministers would assess the effects of Protocol 14 and the implementation of the Action Plan on the workload of the Court. By the end of 2015 the Committee should decide if further action was necessary. Before the end of 2019 the Committee ought to review if the Strasbourg control system is operating on a sustainable basis. If not, then more profound reforms may be necessary.

The Declaration and Action Plan met President Costa's wishes for the Conference in that all the State Parties publicly expressed strong support for the Convention and the Court, together with the principle of subsidiarity. Also a timetable, extending over almost a decade, was set out during which different forms of reforms should be considered and implemented within defined periods of time. Generally, the major future institutional reforms of the ECHR system, requiring amendments to the Convention, identified by the Conference were ideas that have been circulating in Council of Europe fora during recent years. For example, the suggestion that a new judicial filtering body should be established as an adjunct of the Court was one of the key recommendations of the Group of Wise Persons report in 2006.⁴² It is interesting, however, to detect a desire to reinforce (enhance?) the calibre of the Court's Judges. We have already noted Mrs Daubler-Gmelin's observations.⁴³ Without casting any aspersions we may contrast the (relative) youth and professional experience of the Court's newest Judge (appointed in June 2009) who was born in 1973, gained her law degree in 1999 and was called to the Bar in 2002.⁴⁴ The Conference endorsed CDDH's view that the Judges should have a knowledge of public international law. This is not expressly required by Article 21 of the ECHR. However, from its early case-law the Court has acknowledged the relevance of public international law to the interpretation of the Convention.⁴⁵ Furthermore, in recent

⁴² *Final Report* CM(2006)203, 15 November 2006 and see A. Mowbray, "Faltering Steps on the Path to Reform of the Strasbourg Enforcement System" (2007) 7 *Human Rights Law Review* 609.

HRLR

⁴³ *Supra* n.26.

⁴⁴ Judge Pardalos (San Marino) according to her biography on the Court's website.

⁴⁵ For example, in *Golder v UK* (1975) 1 E.H.R.R. 524 and see A. Mowbray, "The Creativity of the European Court of Human Rights" (2005) 5 *Human Rights Law Review*

months the Court has delivered a number of judgments in which public international law played a central role in the Court's reasoning. For example, in *Rantsev v Cyprus and Russia*⁴⁶ a unanimous Chamber utilised a multilateral treaty to extend (and define) Article 4 of the Convention to encompass human trafficking. A united Grand Chamber in *Cudak v Lithuania*⁴⁷ had regard to the trend in international law, limiting the scope of State immunity in respect of employment disputes involving local staff working in diplomatic missions, when assessing the extent of the right of access to a court enshrined in Article 6(1) of the ECHR. Whilst the Grand Chamber in *Medvedyev and others v France*⁴⁸ was deeply divided on whether, *inter alia*, diplomatic notes justified, under Article 5 of the ECHR, the arrest and detention by French commandos, in international waters, of suspected drugs smugglers on board a foreign registered vessel. Pertinently President Costa in his Joint Partial Dissent observed, "[w]e believe that our Court, which operates in the field of general public international law, should take the existence of [those notes] into account...".⁴⁹ Hence there is good reason for the Strasbourg Judges to have an understanding of public international law.

The Committee of Ministers' Deputies "took note" of the Interlaken Declaration within a week of its promulgation.⁵⁰ On the same day Amnesty International expressed concern that some support had been given at the Conference to the idea of charging a fee to lodge a complaint with the Court.⁵¹ Therefore, we can see the post-Declaration debate beginning about the specific reforms needed. The magnitude of the essential reforms of the Strasbourg supervisory system are likely to bear an inverse correlation with the degree to which all States party to the ECHR actually fulfil their legal obligations under the Convention and their political commitment to subsidiarity embodied in the Declaration. If "persistent defaulters", to use Mrs Daubler-Gmelin's terminology, effectively address their repeated failures to safeguard Convention rights within their domestic jurisdictions then the Court's workload should decline. That would reduce the need for new institutional machinery, such as a separate filtering body. But, if a hard-core of States continue to tolerate widespread breaches of ECHR rights and freedoms then fundamental institutional and procedural changes beyond Protocol 14's measures will become essential. We shall continue to analyse the future reform process.

57 at 58. For a general study of the influence of public international law on the Court's jurisprudence see F. Vanneste, *General International Law Before Human Rights Courts* (Antwerp: Intersentia, 2010).

⁴⁶ Judgment of 7 January 2010.

⁴⁷ Judgment of 23 March 2010.

⁴⁸ Judgment of 29 March 2010.

⁴⁹ Ibid. Joint Partly Dissenting Opinion of Judges Costa, Casadevall, Birsan, Garlicki, Hajiyeu, Sikuta and Nicolaou at para. 4.

⁵⁰ 1077th meeting, 24 February 2010.

⁵¹ Jill Heine, Amnesty International's Legal Advisor for Europe: www.amnesty.org/en/news